



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

JRE

Docket No: 8707-97

4 May 1999

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: FORMER [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149
(2) Director, NCPB ltr 5420 Ser 99-23, 9 Mar 99, 11 Feb 99
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting that his naval record be corrected to show, in effect, that he was found fit for duty and discharged for a reason other than physical disability, so that he may qualify for enlistment in the Army.

2. The Board, consisting of Ms. Taylor and Messrs. Pfeiffer and Swarens reviewed Petitioner's allegations of error and injustice on 8 April 1999 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner served on active duty in the Navy from 22 August 1988 to 2 February 1993, when he was released from active duty and transferred to the Temporary Disability Retired List (TDRL) due to the residuals of an injury to his left leg. Based largely on the results of an examination conducted on 5 October 1994, the Record Review Panel of the Physical Evaluation Board determined that his condition was permanent and ratable at 20%. Petitioner accepted those findings on 13 April 1995, and was discharged by reason of physical disability on 2 June 1995.

d. In correspondence attached as enclosure (2), the Board was advised by the Director, Naval Council of Personnel Boards (NCPB), in effect, that Petitioner's request does not warrant any change in the findings of the Physical Evaluation Board. He noted that the 5 October 1994 TDRL evaluation indicates that Petitioner, who worked full time as a computer technician, complained of persistent low back pain aggravated by sitting more than 30 minutes, walking, or lifting up to 30 pounds. The pain ranged from 4/10 to 7/10, depending upon activities, and was localized to the lower back. Petitioner had had a constant pressure type pain before the left femoral intramedullary rod was removed from his femur two months earlier, and then had intermittent pain in the left knee. He had an ache and occasional nocturnal awakenings, but no effusions. He treated the discomfort in the knee with moist heat, and during cold weather, he had to ambulate with a cane and occasionally wore a knee brace. Two months after removal of the intramedullary nail, he had no complaints of pain in the left thigh, buttock or hip. Physical examination revealed no acute distress, a slightly antalgic gait on the left with cane in right hand and knee sleeve on left knee. In the opinion of the examining physician, it was "...likely that after an adequate period of recovery and rehabilitation from the removal of the intramedullary nail from the left femur that he will be able to be returned to full duty." In the opinion of the Director, NCPB, Petitioner was clearly unfit for duty during October 1994, but not sufficiently impaired to warrant his retention on the TDRL. Accordingly, the Physical Evaluation Board acted properly by removing him from the TDRL.

e. Petitioner contends, in effect, that since the removal of the rod from his left femur, he has regained full range of motion in his left leg, with no discomfort. He underwent a pre-enlistment physical examination on 6 May 1997 at the Los Angeles Military Entrance and Processing Station, and was found qualified for enlistment in the Army, but he cannot enlist because of the basis for his discharge from the Navy. He maintains that he did not contest the findings of the Physical Evaluation Board because he was advised by a military attorney that it would be fruitless to do so, because the Navy would never allow him to return to duty.

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the comments of the Director, Naval Council of Personnel Boards, the Board concludes that Petitioner was questionably fit for duty at the time of his discharge in 1995. In this regard, it accepts Petitioner's contention that the symptoms referable to his left leg cleared at some time after surgical hardware was removed from his leg and prior to his discharge from the Navy; that he was found physically qualified for enlistment in the Armed Forces during May 1997; and that the author of the 5 October 1994 TDRL evaluation report believed that Petitioner would be able to be returned to full duty after a further period of recovery and rehabilitation from the removal of surgical hardware from his leg. The Board believes that he should have been retained on the TDRL for a short additional period, or alternatively, reevaluated at some time prior to 2 June 1995, when a more accurate assessment of his fitness for further service could have been made.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.


RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged by reason of physical disability on 2 June 1995; that on 31 May 1995, the Physical Evaluation Board, acting for the Secretary of the Navy, found him fit for duty; that he did not consent to reenlist at that time; and that he was discharged for the convenience of the government on 2 June 1995.

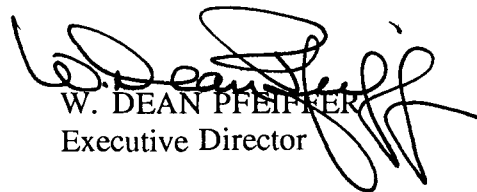
b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

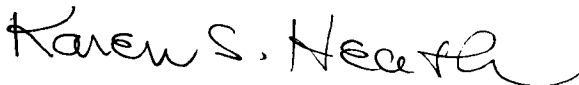
ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER
Executive Director

approved: JUL 2 1999



KAREN S. HEATH
Principal Deputy Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

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